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Ref: **GIR8136**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **4/04/11**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE DECISION OF THE CERTIFICATION OFFICER
DATED 31 AUGUST 2010**

BETWEEN:

DAVID BELL

Appellant;

and

COMMUNICATION WORKERS UNION

Respondent.

Girvan LJ, Coghlin LJ and Sir John Sheil

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] In this appeal David Bell appeals against the decision of the Certification Officer for Northern Ireland made on 31 August 2010 whereby he refused to uphold three complaints made by Mr Bell in which he alleged that the Communication Workers Union ("CWU") breached its own rules. The Certification Officer made his decision pursuant to his powers under Part VIA of the Trade Union and Labour Relations (Northern Ireland) Order 1995 as amended by the Employment Relations (Northern Ireland) Order 1999. An appeal against a decision under Part VIA lies to this court under Article 70(4) of the Industrial Relations (Northern Ireland) Order 1992 as amended by paragraph 4(4) of Schedule 6 to the 1999 Order. Mr Bell appeared in person on the hearing of the appeal and Mr O'Hara QC appeared on behalf of the CWU.

Background to the Appellant's Complaints

[2] In 2007 when the events giving rise to the appellant's complaints occurred, Mr Bell was the Secretary of the Clerical Branch of the CWU in Northern Ireland ("the Northern Ireland Clerical Branch"). He was also the

Regional Assistant Secretary. He worked for the CWU representing members at Industrial and Fair Employment Tribunals and had been a member of the Union and its predecessor unions for over 34 years.

[3] The CWU holds an annual conference outside of which its highest body is the National Executive Council ("the NEC"). Below that there are two industrial Executives namely the Postal Executive and the Telecoms and Financial Services Executive ("the T&FSE"). Mr Bell's branch falls under the T&FSE.

[4] In 2006 the Northern Ireland Clerical Branch developed a policy that the CWU should start to recruit and organise in the Republic of Ireland. It further wanted to bring about a merger with the similarly named but entirely separate and distinct CWU Ireland, a trade union in the Republic which organises and recruits there.

[5] In March 2007 Mr Bell was nominated by the Northern Ireland Regional Committee of the CWU to stand as a candidate for election to the Executive Council of the Irish Congress of Trade Unions ("the ICTU"), the election being scheduled for July 2007.

[6] The 2007 annual conference of the CWU was held in Bournemouth between 3 and 8 June 2007. In May 2007 the T&FSE Standing Orders Committee accepted an emergency motion ("E1") put down by the T&FSE expressing support for CWU Ireland in its efforts to achieve recognition by British Telecom Ireland and it instructed that T&FSE to provide support and assistance to CWU Ireland. Those advocating the EI were thus seeking support for a policy different from that advocated by the Northern Ireland Clerical Branch.

[7] The Northern Ireland Clerical Branch instructed Mr Bell to oppose EI and to seek to have it withdrawn because the motion conflicted with the branch's policy and because it considered that the whole subject had not been the subject of the level of proper informed debate appropriate for the adoption of such a policy. Mr Bell tried unsuccessfully at the General Conference on 3 June to have the motion withdrawn from the T&FSE Conference. The appellant also tried unsuccessfully to have the motion withdrawn at the start of the T&FSE Conference on 5 June 2007.

[8] The debate on motion EI took place on 7 June 2007. The General Secretary of CWU Ireland was present at the debate. Mr Bell spoke against the motion but it was passed despite his opposition and that of the Northern Ireland Clerical Branch.

[9] On 14 June 2007 the General Secretary of CWU, Mr Hayes, wrote to Mr Beggs the General Secretary of the ICTU withdrawing the appellant's nomination for election to the Executive Council of ICTU.

[10] On 9 August 2007 the appellant sent a 6 page letter to the General Secretary in which he said he was raising a formal grievance about the actions of Mr Hayes, Mr Baldwin and Mr Huston. It will be necessary to refer to the contents of that letter in greater detail later.

Mr Bell's Complaints to the Certification Officer

[11] Mr Bell initially made ten complaints against the CWU. Some of those related to matters outside the jurisdiction of the Certification Officer under Article 90A. Eventually he withdrew seven of the complaints leaving three complaints for consideration by the Certification Officer. The first complaint was that on or around 5 June 2007 EI was admitted for debate to the T&FSE Conference agenda in breach of Rule 10.1.3.

[12] Rule 10(1) provides so far as relevant as follows:

“(1) There shall be an Annual Conference of the union in or about May/June of each year to debate and determine matters of policy and to elect such national representatives as are appropriate to be elected at the annual conference.

The normal length of the Annual Conference shall be six days, two days shall be reserved for the General Conference and four days shall be reserved for the Postal and Telecoms and Financial Services conferences. The Business-Grades-Sections-Constituency Conferences will be conducted within this allocation.

(2) The Annual Conference is the supreme authority in the Union on matters of common policy whilst it is in session. The main role of the NEC is to carry out the instructions of the Annual Conference. To this end the supreme authority is vested in the NEC between Conferences. Decisions taken and policies determined on behalf of the union by the NEC are ultimately subject to ratification by Annual Conference.

(3) The procedures for promoting policy in the TUC, and the wider Labour movement, and

associated delegations will be the responsibility of the NEC.”

[13] It was Mr Bell’s case that the issue of support for another trade union in seeking recognition rights is a TUC and wider labour movement matter which is the responsibility of the NEC and, therefore, the business of the General Conference and not the T&FSE Conference alone. He sought a determination that EI was inappropriately placed for discussion at the T&FSE Conference in breach of Rule 10.1.3.

[14] His second complaint was that on or around 25 June 2007 his nomination to stand for election to the Executive of the ICTU which had been unanimously agreed by the CWU Northern Ireland Regional Committee was withdrawn by the General Secretary of the CWU and the Northern Ireland Regional Secretary of the CWU Mr L Huston without providing him with an explanation or seeking a democratic decision from the NEC and/or the Northern Ireland Regional Committee to do so. Mr Bell believed that that was an act of discipline that imposed a disciplinary sanction and a severe detriment on him without invoking the Union rules on disciplinary procedures contrary to rule 14.

[15] His third complaint was that on and around 9 August 2007 the General Secretary failed to deal with his complaint that Mr Huston, the CWU Northern Ireland Regional Secretary, breached the rules of the CWU (Rule 4.1.5) when he wrote to the General Secretary of the ICTU on or around 25 June 2007 withdrawing his nomination for election to the ICTU Executive Council without seeking endorsement of that decision by the CWU, NEC and/or the Northern Ireland Regional Committee. The General Secretary Mr Hayes and the National Officer Mr Baldwin were also cited in the complaint.

The Role of the Certification Officer

[16] The post of Certification Officer was established under the 1992 Order. His powers were extended and strengthened by the 1995 Order and the 1999 Order and the Employment Relations (Northern Ireland) Order 2004. The legislation confers on the Certification Officer powers to determine a range of complaints by trade union members against their unions and to ensure that the internal affairs of trade unions and employers associations are properly conducted.

[17] Article 90A in Part VIA of the 1995 Order (as inserted by paragraph 22 of Schedule 6 of the 1999 Order) confers on union members who claim that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters in Article 90A(2) a right to apply to the Certification Officer for a declaration to that effect (subject to paragraphs 3 to 7). The relevant matters in paragraph 2 are:

- “(a) the appointment or election of a person to, or the removal of a person from any office;
- (b) disciplinary proceedings by the union (including expulsion);
- (c) the balloting of members on any issue other than industrial action;
- (d) the constitution or proceedings of any executive committee or of any decision making meeting;
- (e) such other matters as may be specified in an order made by the department.”

Under Article 90B the Certification Officer may refuse to accept an application for a declaration under Article 90A unless he is satisfied the applicant has taken all reasonable steps to resolve the claims by the use of any internal complaints procedure of the union. If he accepts an application under Article 90A paragraph 2 of Article 90B provides that he:

- “(a) shall make such inquiries as he thinks fit;
- (b) shall give the applicant and the union an opportunity to be heard;
- (c) shall ensure that so far as is reasonably practicable the application is determined within 6 months of being made;
- (d) may make or refuse a declaration asked for;
- (e) shall, whether he makes or refuses the declaration, give reasons for his decision in writing.”

Under Article 90B(3) when the Certification Officer makes a declaration he shall also, unless he considers that to do so would be inappropriate, make an enforcement order, that is an order imposing on the union one or both of the following requirements:

- “(a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;

- (b) to abstain from such acts as may be so specified with the view to securing that a breach or threat of the same or a similar kind does not occur in the future.”

He must also specify the period within which the union is to comply with the requirement.

[18] Having heard evidence and submissions from the parties the Certification Officer refused to make a declaration in respect of any of Mr Bell’s complaints. The question in this appeal is whether the Certification Officer was right to refuse to make a declaration in respect of each of the complaints.

Complaint 1

[19] Although Mr Bell initially sought to argue that his first complaint was justified and that the Certification Officer erred in rejecting it, in the course of his submissions he accepted that he could not press this complaint. It was Mr Bell’s initial argument that EI was inappropriately placed for discussion at the T&FSE Conference in breach of Rule 10.1.3 because the issue of support for another trade union in seeking recognition raised a TUC and wider labour movement matter which was the responsibility of the NEC and it should have been a matter for the General Conference and not the T&FSE Conference. The appellant’s complaint focussed entirely on an alleged breach of Rule 10.1.3. That rule however relates to the *procedures* for promoting policy in the TUC, and the wider labour movement, and associated delegations which is the responsibility of the NEC. The *determination* of policy is a matter for the Annual Conference under Rule 10.1.1 with the Annual Conference under rule 10.1.2 being the supreme authority in the Union on matters of common policy whilst it was in session. The business of the T&FSE Conference was to consider motions submitted by the T&FSE Executive and branches. Mr Bell recognised that he could not rely on a breach of rule 10.1.3 in the context of this complaint and that his real argument was that it was outwith the jurisdiction of the T&FSE Conference to debate a matter such as EI which, he asserted, was a matter which fell exclusively within the jurisdiction of the General Conference.

[20] In the result Mr Bell’s appeal against the Certification Officer’s decision on Complaint 1 must be dismissed.

Complaint 2

[21] The appellant contended that the decision to withdraw his nomination as a candidate in the election to the Executive of the ICTU was conducted in breach of Rule 14 which deals with discipline and Rule 4.1.5 under which members of the CWU are entitled to stand for "Union" office in accordance with the Rules and branch constitutions. The claims that Mr Bell had expressed views in a public forum which were directly contrary to those of the CWU and which allegedly undermined the union had never been put to the appellant prior to the withdrawal of his nomination and he was not given the chance to defend himself against the charge. The withdrawal of the appellant's nomination to the ICTU Executive Council was not the subject of a CWU National Executive Committee decision and/or Regional Committee decision. The withdrawal of his nomination was initiated by a letter dated 14 June 2007 to David Beggs General Secretary of the ICTU purporting to be signed by Billy Hayes, General Secretary of the CWU. The appellant submitted that Mr Hayes did not even sign the letter. Lawrence Huston, the CWU Northern Ireland Regional Secretary, sought to withdraw the appellant's nomination by letter dated 25 June 2007 without the authority of a CWU and/or Northern Ireland Regional Committee decision. Mr Bell submitted that he raised a formal grievance with Mr Hayes in accordance with the statutory provisions of the Employment (Northern Ireland) Order 2003, (Dispute Resolution) Regulations (Northern Ireland) 2004 and CWU Rule 14 in respect of the withdrawal of his nomination on 9 August 2007 and 14 September 2007. He submitted that Mr Hayes failed to act on the grievance.

[22] The Certification Officer concluded that there was no intention to impose penalties on Mr Bell for anything he had done at the conference. The intention was to prevent him from doing damage in the future to the reputation of the union by advocating with the ICTU a policy which was in conflict with the union's own policy.

[23] At paragraph [52] of his decision the Certification Officer stated:

"For Mr Bell's claim to succeed, therefore, he has to show that the Union's withdrawal of his nomination was done with the intention of disciplining him. The evidence he offers is that it was part of a wider pattern of bullying and harassment against him and that Mr Huston told him that the withdrawal was retribution for his activities at the conference. I find the evidence for a wider pattern of bullying (...) less than compelling. As regards Mr Huston's alleged statement about retribution the Union denies that

he made it. It would not have been unnatural, however, for Mr Bell to suspect that the motive for the withdrawal was to punish him since it does appear that his interventions caused visible annoyance to senior officials of the Union and Mr Hayes' action followed swiftly after those interventions. The Union's contention, on the other hand, is that Mr Hayes' motive was to protect the union: Mr Bell's views were clearly at odds with the Union's policies on CWU Ireland and recruitment in the Republic of Ireland and the integrity and reputation of the Union would be at risk if he were given a platform within ICTU to push those views. This seems not an unreasonable fear since mixed messages about the Union's views on these issues would risk causing harm to its standing generally and its relations with CWU in particular. Although I accept the withdrawal of his nomination subjected Mr Bell to a detriment (the significant part of which was in my view the loss of a good though not certain prospect of becoming a member of ICTU's Executive Council), the evidence available is not such that I can conclude with reasonable probability that its motivation was a desire to discipline. I find that therefore it was not an intentional penalty imposed by the Union for deliberately disciplinary purpose."

[24] Drawing on the decision of the EAT in Gallagher v Unison (UKEAT - 0280-05-MAA) and the decision of the GB Certification Officer in Corrigan v GMB (No 2) (D-35-36-07) the Certification Officer concluded that there were three situations which fell within the scope of Article 90A(2)(b) of the 1995 Order:

"(a) Where a union purported to discipline a member, but did not observe its rules in terms of procedural safeguards and/or the range of permissible sanctions.

(b) Where a union in effect disciplined a member, by imposing disciplinary sanction within its rules - but without purporting to invoke its rules concerning discipline at all.

(c) Where a union subjected a member to a significant detriment by depriving him/her of a significant entitlement under its rules (albeit not a disciplinary penalty within its rules) for a deliberately disciplinary purpose.”

[25] He concluded, correctly in our view, that the situation could not fall within (a). He concluded, also correctly in our view, that the facts of the case did not fall within (b). The withdrawal of Mr Bell’s name as a candidate in the ICTU election was not a disciplinary penalty as such. Although Mr Bell argued that withdrawal of his name as a candidate in the ICTU election was removal of an entitlement to stand for Union office under Rule 4(1)(5) it is clear that the Union office referred to in that rule is office within the CWU. The use of the capital letter in conjunction with the word throughout the rules makes it clear that that when used it refers to the CWU as opposed to another union (with a small ‘u’).

[26] The Certification Officer concluded that if a case is to fall within paragraph (c) there must be a deliberately disciplinary intent and if there is no disciplinary intent the action cannot be regarded as disciplinary. We consider that this proposition (as was established in Gallagher v Unison by the EAT) is correct. If an action is taken that gives rise to a detriment to a union member but it is taken to achieve a non-disciplinary purpose the mere infliction of detriment cannot of itself convert that action into a form of discipline if the action is taken to advance the union’s interests and not as punishment of the individual concerned. It must be a question of fact whether a decision-maker acted to impose a punishment on an individual or to advance a legitimate union purpose. In the present case the Certification Officer concluded on the facts that the action was not an intentional penalty imposed for a deliberately disciplinary purpose. That was a decision which he was entitled to reach on the material before him and it cannot be shown that the Certification Officer’s decision was perverse or unsupported by evidence.

Complaint 3

[27] The appellant wrote a letter dated 9 August 2007 to Mr Hayes the General Secretary of the CWU in which he began by stating that he was raising a formal grievance in respect of Mr Hayes’ letter to Mr Beggs of ICTU withdrawing the nomination submitted by Mr Huston the Regional Secretary in Northern Ireland in the name of Mr Bell for election to the ICTU Executive. He stated that his grievance was against Mr Hayes as General Secretary for acting contrary to the Union rules. He also cited John Baldwin and Lawrence Huston. The letter went on to set out the grounds on which Mr Bell complained about the way the matter was dealt with. He complained that if his nomination had been allowed to stand he would have been elected to the ICTU NEC for 2007-2009. He stated:

“I consider your action in relentlessly pursuing the withdrawal of my nomination as a clear abuse of your power, unjustly contrived and outwith the rules of the Union. The deed was reprehensible in its construction and maliciously executed to allegedly make retribution for your alleged imagining that I had embarrassed the CWU Ireland. I also believe that you may have been motivated by an anti Irish predilection and hostility to my religious and/or political belief. To my knowledge such a draconian action is unprecedented in the history of the Union and would not be contemplated or tolerated in any election situation in England, Scotland and Wales.”

Mr Bell contended that Mr Hayes’s had attempted to embarrass him during the discussion at General Conference in respect of the motion EI; that a hostile environment to rob him of dignity was being created, arguably initiated by Mr Hayes; and that Mr Hayes supported by Lawrence Huston, the Northern Ireland Regional Secretary, and Mr Baldwin, the International Affairs Officer in withdrawing his nomination were guilty of bullying, harassment, abuse of power, a denial of human right to dignity and respect, unjust discipline, a denial of natural justice, potential discrimination on the grounds of race and/or political belief and victimisation. He asserted that Rules 2.4, 2.5, 2.6, 2.9, Rule 4.1, 4.5, Rule 8.1, 8.6.3, 9.5(a), Rule 10.3 and Rule 14 had been breached. He concluded his letter with a request that CWU inform him what steps it would take to remedy the breach of the union rules and what action Mr Hayes would take to ensure that a breach or threat of the same or similar kind does not occur in the future. He asked how the General Secretary would ensure an independent investigation of his complaints.

[28] The appellant contended that the letter raised disciplinary matters in accordance with Rule 14.1.2(a) and that his complaint should have been referred by the General Secretary to the CWU National Discipline Committee for consideration. This argument was rejected by the Certification Officer in paragraph [58] of his decision. The Certification Officer stated:

“... In the end however I am not satisfied that Mr Bell intended it to be referred to the NDC and so initiate disciplinary action under Rule 14 or that Mr Hayes could necessarily have been expected to see it as such. The words discipline and disciplinary each appear once in the letter where they refer to the discipline that Mr Bell claimed to

have suffered, not any discipline he was invoking against Mr Hayes, Mr Baldwin and Mr Huston. The NDC is not mentioned and though Rule 14 is cited this is only as one in the list of 11 rules of the union that Mr Bell claimed were breached, not as a rule being invoked against Mr Hayes. Mr Bell had another chance to make clear to Mr Hayes that this was a Rule 14/NDC matter when he wrote his reminder letters some 5 weeks later but did not do so, though he did mention a further possible grievance under employment rights legislation. ... I find that, despite some counter indications as mentioned above, on the balance of probabilities Mr Bell did not intend his letter of 9 August 2007 to initiate the Union's Rule 14 disciplinary procedures and it was reasonable for Mr Hayes to conclude that he did not intend to do so."

[29] So far as material Rule 14 provides as follows:

"1. General

1. Matters of a disciplinary nature arising from the Rules or Regulations of the Union affecting union members shall be dealt with in accordance with this Rule.

2, A member shall be liable to disciplinary action in respect of the following:

- (a) Acting in breach of the Rules of the Union;
- (b) Behaving in a manner contrary to the interests of the Union;
- (c) ...
- (d) ...

2. National Discipline Committee (NDC)

1. All matters calling for disciplinary action shall be determined by the NDC, which shall consist of three members appointed by the NEC. There shall be three named substitutes to replace any or all of the members of the NDC if they are not available.

2. The Committee shall be served by an Officer appointed by the General Secretary.

3. National Discipline Committee Powers and Procedures

1. All matters requiring consideration under this Rule shall be referred by the General Secretary to the NDC. Such matters may be referred by either a member or a Branch.

...

5. The NDC shall consider each charge and conclude whether or not a prima facie case exists. If a prima facie exists it shall proceed to a full hearing of the NDC."

[30] The letter sent by Mr Bell makes clear that he was asserting in strong terms that Mr Hayes, Mr Huston and Mr Baldwin had breached a number of Rules in the manner in which Mr Bell had been treated by them in relation to his opposition to the EI motion and in relation to the withdrawal of his nomination for the ICTU election. If a Union member makes to the General Secretary serious allegations against another Union member alleging misconduct arising out of breaches of Union rules the General Secretary would be bound to consider whether Rule 14.3.1 required the matters to be referred to the NDC for consideration. It would then be a matter for the NDC to consider whether there was a prima facie case (see Rule 14.3.5). If so, the matter would then proceed to a full hearing by the NDC. Rule 14.2.1 makes clear that all matters relating to disciplinary action shall be determined by the NDC.

[31] Rule 14 does not require a complainant to spell out in terms that he is seeking to invoke a reference of his complaints and allegations by the General Secretary to the NDC. However, if a complainant sets out allegations of breaches of the Union rules he is making allegations which if made good, could lead the NDC to conclude that a disciplinary charge should be brought on the facts. Acting in breach of the Rules of the Union gives rise to a potential charge leading to the activation of disciplinary procedures. Where a Union member makes allegations against a third party the General Secretary would be bound to fairly consider whether on the material presented an investigation by the NDC under Rule 14 would be appropriate. This would be so even if the complainant makes no specific reference to Rule 14 or to the need for a disciplinary investigation or to the need for the matter to be referred to the NDC under Rule 14. The General Secretary would be bound to

consider the matter and determine whether a reference of the matter to the NDC was called for.

[32] However, in the present case the General Secretary was both the recipient of the letter and the subject matter of the allegations. While he had the duty to decide whether the matter should be referred to the NDC, there being an apparent conflict of interest the General Secretary could not fairly determine the question whether there was evidence that he himself might be guilty of a disciplinary offence. Since he could not determine that issue fairly the matter necessarily required consideration by the NDC, the independent body established to determine whether there was sufficient evidence to proceed to a disciplinary hearing under Rule 14.

[33] In the result, contrary to the Certification Officer's conclusion, we conclude that there was a breach of Rule 14.3.1 arising from the failure by the General Secretary to refer the appellant's allegations to the NDC. The appellant is entitled to a declaration that Mr Hayes breached Rule 14.3.1 by not referring the contents of the letter to the NDC.

[34] As a consequence of the appellant's entitlement to that declaration it is necessary to determine whether the Certification Officer should have made an enforcement order under Article 90B(3) requiring that the letter of complaint be so referred. This is a question which could be referred back to the Certification Officer but, as both parties accept, this court can exercise the powers available to the Certification Officer under Article 90B(3) (see Section 22 of the Interpretation Act (Northern Ireland) 1954). Where a declaration is made, unless it is considered inappropriate, an enforcement order shall be made in the circumstances. Since the declaration which we consider should be made determines that the matter should have been referred to the NDC we see no advantage in remitting the matter to the Certification Officer to consider whether to make an order which we conclude must clearly be made. Accordingly, we shall order that the Union shall take all necessary steps to refer the contents of the letter of 9 August 2007 to the NDC for consideration under Rule 14. In order to satisfy the requirements of Article 90B(4) we direct that that should be done within 14 days.

[35] We shall hear the parties on the question of the costs of the appeal.